BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AMUR Q. DRENNEN, Claimant, v. SWIFT TRANSPORTATION CO., INC., Employer, and INDEMNITY INSURANCE CO. OF NA., Surety, Defendants.	)	**IC 2005-011240** **IC 2006-006989** **ORDER REGARDING POST-HEARING MOTIONS** October 1, 2008

INTRODUCTION

A series of motions have been filed by both parties since the Commission issued its decision on June 16, 2008, in this case. On July 2, 2008, Defendants timely filed, pursuant to Idaho Code § 72-718, a Motion for Reconsideration and memorandum in support thereof. On July 7, 2008, Claimant also timely filed a Motion for Clarification and Partial Reconsideration along with a brief in support thereof. Finally, on August 8, 2008, Claimant filed a Motion for Judicial Notice of Flores, Idaho Indus. Comm'n 001912, June 20, 2008. Each of these motions is addressed individually below.

DEFENDANTS' MOTION FOR RECONSIDERATION

Defendants request the Commission reconsider the medical causation and accident issues. As for medical causation, Defendants reassert the best explanation for Claimant's spinal artery infarction is his pre-existing risk factors. Defendants dispute reliance on Drs. Cox and Langhus.

In particular, they contend Dr. Cox's opinion - that the neurologic process in Claimant's case took mere minutes to progress into lower extremity paralysis - is not supported by the medical studies. Defendants further challenge the Commission's understanding of the medical theory it deemed persuasive - fibrocartilaginous embolism - because there is a reference to low back pain in the Commission's finding of an accident. *See*: Drennen, 011240 and 006989, ¶ 24, at 10, June 16, 2008. As for the accident issue, Defendants contend the facts of the case fail to demonstrate an "untoward event," "mishap," or something "unexpected" as required under Idaho Code § 72-102 (18)(b). Finally, Defendants invite the Commission to speculate as to the practical implications of the decision regarding Claimant's ability to qualify for governmental assistance in Ohio.

In response, Claimant contends Defendants are merely rehashing the evidence. Claimant asserts Dr. Cox's opinion, and the time sequence he espouses, is consistent with the medical studies as well as with prior Commission decisions compensating vascular accidents, and prior Commission decisions relying on close temporal relationships. Claimant also references several well-known cases, such as Wynn, Spivey, Hutton, and McAtee, in support of the Commission's accident finding. Finally, Claimant chides Defendants' benevolent concern for Claimant's financial welfare as an attempt to get a "free ride" at the expense of other government programs.

Medical causation

Conflict clearly exists between the parties' medical experts. A fibrocartilaginous embolism resulting in spinal artery infarction is rare. However, conflict and rarity are not impossible legal hurdles. In this case, the weight of the medical evidence persuaded the Commission to find that Claimant's spinal artery infarction resulted from a fibrocartilaginous embolism that ruptured on October 17, 2005, when Claimant cranked the loading gear of his employer's truck. Referee Taylor carefully reviewed the voluminous medical records in

evidence, and clearly articulated his determination that Drs. Cox and Langhus were persuasive.

> . . . [T]he documented presence of a Schmorl's node at T-5—the precise level of Claimant's spinal artery infarction, the acute onset of Claimant's symptoms within approximately ten minutes of his cranking the trailer landing gear, and the well-reasoned opinions of Dr. Langhus and Dr. Cox describing the mechanism of infarction persuade the Referee that Claimant's work activities of October 17, 2005, caused his anterior spinal artery infarction. Drennen, 2005-011240 and 2006-006989, ¶ 20, at 9, June 16, 2008.

Defendants contend Dr. Cox contradicted himself regarding the time necessary for the embolic process. However, Dr. Cox's testimony, predicated upon the medical studies as a whole, consistently left open the possibility that neurologic symptoms could arise within minutes of a blockage. *See:* Cox Dep. 13: 9-17, June 14, 2007. The Commission remains confident the medical evidence in this case meets the reasonable degree of medical probability standard.

Accident

The Commission remains equally confident that the facts support the finding of an accident. When Claimant bent over and cranked the landing gear of his truck on October 17, 2005, it set into motion a rapid series of medical events and simultaneous symptoms culminating in lower extremity paralysis. The Commission also understands the significance of Claimant's low back pain on October 17, 2005. It represents the first of a rapid series of physical symptoms culminating in an industrial injury. There is no realistic ambiguity in paragraph 24 of the decision, especially when read in context with the previous reference to Wynn v. J.R. Simplot Co., 105 Idaho 102, 104-105, 666 P.2d 629, 631-632 (1982).

Practicalities

Finally, the Commission will not entertain Defendants' speculation that Claimant might not benefit from an award of workers' compensation benefits. Medicaid and Ohio Medicare are outside this Commission's jurisdiction as well as the legal and factual boundaries of this case. *See*: Idaho Code § 72-707.

CLAIMANT'S MOTION FOR CLARIFICATION

Typographical error

Claimant seeks several points of clarification. The first concerns a typographical error to which the Defense agreed. Claimant took Dr. Langhus' deposition on August 27, 2007; not Defendants. Claimant's request to clarify the portion of the decision entitled "**EVIDENCE CONSIDERED**" is GRANTED, and item No. 5 on page 3 of the decision is hereby AMENDED accordingly.

Findings of fact

Second, Claimant seeks to amend decision paragraph 10 on page 5 to include a finding that the Defense waited 1 year to clarify Dr. Williamson's December 5, 2005, written opinion on medical causation. His written opinion on causation diverged from his initial verbal opinion issued on October 20, 2005. The Commission will not amend the decision. Such a fact is not necessarily true, nor is it determinative when placed in context with the other facts which were included in the findings.

Medical and total permanent disability benefits

Third, Claimant requests the Commission specify the amount of medical and total permanent disability benefits to which Claimant is entitled. A close review of the record supports Claimant's position with regard to medical benefits; but not with regard to total permanent disability.

In pertinent part, the noticed issues were framed as "3. Whether and *to what extent* Claimant is entitled to . . . a. medical care; . . " and "5. Whether Claimant is totally and permanently disabled." Notice of Hearing 1-2, emphasis added. These issues were later agreed upon at hearing, and briefed. The Defense chose to focus on compensability. They did not dispute the calculations presented by Claimant or present their own figures. The term "to what

extent" in the noticed issues proved a tactical advantage for Claimant. It fairly necessitates a sum certain finding on medical benefits. Therefore, the Commission will specify the amount of medical benefits to which Claimant is entitled.

Total permanent disability was not so strategically noticed. Likely, this is because total permanent disability benefits are not traditionally calculated by the Commission. In keeping with standard practice, the Commission included a date (October 17, 2005) upon which Claimant became totally and permanently disabled. As correlating issues were not also noticed, the Commission assumes this date sufficiently informs the Defendants of their responsibility to pay.[1]

Based upon the foregoing, Claimant's Motion for Clarification is DENIED IN PART and GRANTED IN PART. The decision will be accordingly amended below.

CLAIMANT'S MOTION FOR RECONSIDERATION

Dr. Montalbano

Claimant asks the Commission to reconsider paragraph 20 on page 9 of the decision. Claimant argues Dr. Montalbano's medical opinion should not be characterized with the other testifying physicians' opinions as "well-reasoned and enlightening." First, Claimant attacks the foundation of Dr. Montalbano's opinion. Second, Claimant contends he presented new medical causation theories in his post-hearing deposition thereby violating JRP 10(E) and IRCP 26(b)(4). Third, Claimant contends the doctor's testimony was too inconsistent to be called "well-reasoned and enlightening." Finally, Claimant contends the doctor impossibly misrepresented his experience with spinal cord infarctions. Defendants assert that Dr. Montalbano's opinion need not be impugned before Dr. Cox can be deemed more persuasive.

Claimant's arguments in this respect are without merit. The actual cause of Claimant's

[1] Claimant's "triple windfall," collateral estoppel, and avoidance-of-piecemeal-litigation arguments are not addressed herein. The simple fact that the "extent" of medical benefits was noticed is sufficient justification for this finding on reconsideration.

spinal artery infarction presented many medical and legal questions. Dr. Montalbano's opinion, although ultimately not persuasive, was "well-reasoned and enlightening." He explored the risk factors for spinal artery infarction and theorized that Claimant's hyperlipidemia and obesity caused Claimant's spinal artery infarction. The language Claimant disputes merely expresses an appreciation for all the medical opinions presented in this extraordinarily complicated and unusual case. Although it is incumbent on a claimant to establish the right to compensation by a preponderance of the evidence, it is not necessary that the cause of the injury relied upon be proven to the exclusion of other possible causes. Suren v. Sunshine Mining Co., 58 Idaho 101, 108 70 P.2d 399, 403, (1937); *See also:* Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211, (2000).

Furthermore, Dr. Montalbano's post-hearing deposition testimony is not manufactured evidence in violation of JRP 10(E) and IRCP 26(b)(4). A close reading of the doctor's August 9, 2006, report and his 2007 post-hearing deposition reveal the doctor consistently attributed Claimant's spinal artery infarction to hyperlipidemia and obesity. He explained his theory that Claimant's "increased viscosity of his blood related to hyperlipidemia, as well as his obesity. . . ." led to the spinal artery infarction. Montalbano Dep. 7: 16-19, August 8, 2007. He also responded to a smattering of topic-hopping cross-examination questions. They included: his awareness of key facts, spinal artery infarction in the general population, primary and secondary causes of spinal artery infarction, brain stroke, testing methods, medical studies, the significance of Claimant's low back pain, drug abuse and stroke, and the limited treatment for spinal artery infarction. Montalbano Dep. 14-50, August 8, 2007. His opinion was not "inconsistent and ever-changing;" Claimant's cross-examination topics were.

Attorney fees

Finally, Claimant seeks an award of attorney fees on reconsideration. First, Claimant

contends the denial in October, 2005, was unreasonable because it was merely based on the *verbal* opinion of a treating doctor. Second, Claimant contends the denial in November, 2005, was unreasonable because it was issued without the benefit of Dr. Williamson's written report. And third, Claimant contends Defendants' denial became positively unreasonable after December 5, 2005, when Dr. Williamson's written report arrived *in support of compensating Claimant.* Claimant contends clarification should have been sought sooner than December 2006. Defendants maintain the treating doctor's verbal opinion was sufficient basis for their initial denial. They also point out it took many months for Claimant to generate a medical theory on causation.

The Commission is not persuaded to award attorney fees in this case. Although ultimately overcome by Claimant's evidence, the record does contain medical evidence to support Defendants' initial and continuing denials, such as: Dr. Williamson's October 20, 2005, verbal opinion; Nurse Neilson's October 24, 2005 note; Nurse Neilson and Dr. Allen's October 22, 2005, note; and Dr. Montalbano's August 9, 2006, report. Claimant's Motion for Reconsideration is DENIED.

CLAIMANT'S MOTION FOR JUDICIAL NOTICE

Claimant requests the Commission take judicial notice of Flores, Idaho Indus. Comm'n 001912, June, 2008, because it concerns the measure of Defendants' liability for past medical expenses. Defense has not responded.

The law as it exists at the time of the injury is the law that applies in an Idaho workers' compensation case. *See:* Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 917, 772 P.2d 119, 124 (1989). Flores was not issued until well after Claimant's October 17, 2005, injury. Therefore, Claimant's request for judicial notice is DENIED.

AMENDMENT

1. Paragraph 25, on page 10 of the decision, is AMENDED to include the following sentence at the end of the paragraph:

These medical benefits amount to $279,801.16.

2. Conclusion of Law 2, and Order 2 are DELETED and REPLACED with the following:

2. Claimant has proven he is entitled to reasonable medical benefits in the amount of $279,801.16 for his October 17, 2005, industrial accident.

DATED this __1st__ day of __October_____, 2008.

INDUSTRIAL COMMISSION

__/s/_____
James F. Kile, Chairman

_/s/_____
R. D. Maynard, Commissioner

_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on __1st___ day of _____October_____, 2008, a true and correct copy of the foregoing **ORDER REGARDING POST-HEARING MOTIONS** was served by regular United States Mail upon each of the following:

RICK D KALLAS
1031 E PARK BLVD
BOISE ID 93712-7722

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701

sn/cjh

_/s/_____